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Attorneys for Intervenor Montana State Fund

**FILED**

**AUG 1 8 2008**

OFFICE OF  
WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

<p>CASSANDRA SCHMILL,  Petitioner,  vs.  LIBERTY NORTHWEST INSURANCE CORPORATION,  Respondent,  and  MONTANA STATE FUND,  Intervenor.</p>	<p>WCC No. 2001-0300  MONTANA STATE FUND'S RESPONSE BRIEF REGARDING CALCULATION OF ATTORNEY FEES</p>
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DOCKET ITEM NO. 444

## **BACKGROUND**

Before this Court is the narrow issue of the correct method for calculating common fund attorney fees where an offset pursuant to §§ 39-71-701(6) or 39-71-702(7) MCA had been taken by the insurer for those claimants who received social security disability income (SSDI). It was the Montana State Fund's (MSF's) practice, prior to Schmill, to proportionally apportion the calculated weekly offset amount. By way of explanation whatever percentage of apportionment that was applied to total disability benefits was also applied to the offset.

In order to explain matters, MSF sets forth the following illustration:

### **Assumptions:**

Total disability rate - \$260.00  
Amount apportioned as work related – 60%  
Social Security Disability (SSDI) entitlement - \$200.00 weekly  
SSDI offset - \$100.00 (50% of \$200.00)

### **Benefit Calculation pre Schmill:**

The \$260.00 disability rate is reduced by the 60% apportionment to \$156.00 ( $\$260.00 \times 60\% = \$156.00$ )  
The SSDI offset is correspondingly reduced by the 60% apportionment to \$60.00 ( $\$100.00 \times 60\% = \$60.00$ )  
The apportioned disability rate less the apportioned SSDI offset calculates to \$96.00 weekly ( $\$156.00 - \$60.00 = \$96.00$ )

### **Benefit Calculation post Schmill:**

Removal of the apportionment increases the total rate back to \$260.00 weekly.  
The SSDI apportioned offset is also increased back to its original rate of \$100.00 weekly.  
The total disability rate, after offset, is now \$160.00 ( $\$260.00 - \$100.00 = \$160.00$ )

## **DISCUSSION**

We begin with the premise that MSF has no financial incentive with regard to its position in this matter. If this Court accepts Petitioner's attorney's argument the monies for the increased attorney fee will come out of the claimants' share. It will be the claimants who bear the financial burden.

Utilizing the above example, post Schmill, claimant's weekly benefits would increase \$64.00 a week [ $\$160.00 - \$96.00 = \$64.00$ ]. Applying a 25% attorney fee would result in a fee to Petitioner's attorney of \$16.00 weekly [ $\$64.00 \times 25\% = \$16.00$ ]. The net amount to claimant would be \$48.00 [ $\$64.00 \times 75\% = \$48.00$ ].

Petitioner's attorney advocates entitlement to a fee based on the gross amount of the increase in the total rate, rather than the net amount the claimant actually receives. Again using the above example claimant's apportioned total rate pre Schmill, pre SSDI offset is \$156.00. Post Schmill, claimant's total rate, pre SSDI offset, is \$260.00. The difference of these two amounts is \$104.00 [ $\$260.00 - \$156.00 = \$104.00$ ]. If Petitioner's attorney is allowed to apply a 25% attorney fee to the gross amount of \$104.00, this yields \$26.00. In this situation claimant nets only \$38.00 [ $\$64.00 - \$26.00 = \$38.00$ ]. Even more startling is the percentage attorney fee. Claimant's weekly benefits increased \$64.00 and the percentage of this amount that would be payable to Petitioner's attorney is over 40% [ $\$26.00 \div \$64.00 = 0.406$ ]. This exceedingly large percentage would not be justified on an individual claim but is even more egregious in light of the fact that that this case is a common fund and the 40+% attorney fee would be applied to a multitude of claimants. Pursuant to administrative rule, Petitioner's attorney fee is limited to 25%. Mont. Admin. R. 24.29.3802(3)(b).

Attorney fees can only attach to those benefits "the claimant gained due to the efforts of the attorney." (§39-71-613 MCA). The *Schmill* SSDI recipients will never receive the gross increase in their total disability benefits. The only increase they will "gain" is the net amount.

Petitioner's attorney cites *Lockhart v. New Hampshire Ins. Co.*, 1999 MT 205, 295 Mont. 467, 984 P.2d 744 and suggests that an attorney lien attaches to disputed medical benefits even though the claimants do not receive the benefits in hand. Reliance on *Lockhart* is misplaced. To begin with *Lockhart* claimants pay nothing. They receive full medical benefits and the medical provider covers the attorney fee. Contrast this to the instant matter, where application of an attorney fee based on the gross will result in monies being taken directly out of the pocketbooks of claimants. Instead of receiving an increase of 75% (100% less 25% attorney fee), they will only receive an increase of 59.4% (100% less 40.6% attorney fee).

*Hartford v. Young* (1989), 239 Mont. 527, 782 P.2d 365, another case cited by Petitioner's attorney, actually supports MSF's position. ". . . an attorney may bill for debts waived through the attorney's efforts. A waiver of debt is a benefit to the claimant obtained by the attorney. . ." 239 Mont. at 531. A reduction of a debt is a monetary benefit to a claimant which without the attorney's intervention would be payable in full. The court went on to note that an attorney can not charge more than 25% of the amount "the claimant receives." 239 Mont. at 531. In the present matter Petitioner's attorney is advocating a 40+% attorney fee based upon an increase in the total rate. This increase in the total rate does not translate into monies "the claimant receives" and is therefore

SCHMILL v. LIBERTY NORTHWEST INSURANCE CORPORATION AND MONTANA STATE FUND  
BRIEF REGARDING CALCULATION OF ATTORNEY FEES

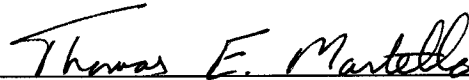
prohibited by *Hartford*. Finally under *Hartford* claimant's attorney fee can not exceed 25% of the amount that "the claimant receives".

### CONCLUSION

The calculation of an attorney fee for those SSDI Schmill beneficiaries should be based on the net increase in benefits they actually receive due to the Schmill decision. The Schmill attorney is not entitled to an attorney fee based on a "paper" increase in the total rate that a claimant never actually receives.

Respectfully submitted this 19<sup>th</sup> day of August 2008.

MONTANA STATE FUND



Thomas E. Martello  
Special Assistant Attorney General

### CERTIFICATE OF SERVICE

I hereby certify that I served a true and correct copy of the foregoing on the following party:

Larry Jones  
Liberty NW Ins. Corp.  
700 SW Higgins, Ste. 108  
Missoula, MT 59803-1489

Laurie Wallace  
Bothe & Lauridsen, P.C.  
P.O. Box 2020  
Columbia Falls, MT 59912

By depositing the same in the United States mail, postage prepaid, on this 19th day of August 2008.



SCHMILL v. LIBERTY NORTHWEST INSURANCE CORPORATION AND MONTANA STATE FUND  
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Thomas Martello, 1-406-444-7724

Laurence Hubbard, President/CEO

August 19, 2008

Clara Wilson  
Clerk of Court  
Montana Workers' Compensation Court  
P.O. Box 537  
Helena, MT 59624-0537

RE: *Cassandra Schmill v. Liberty Northwest Insurance Corporation and Montana State Fund*;  
WCC No. 2001-0300

Dear Clara:

Enclosed please find a corrected Certificate of Service for *Montana State Fund's Response Brief Regarding Calculation of Attorney Fees* which was filed with the Court on August 18, 2008 in the above-referenced matter. Counsel for Liberty Northwest Insurance Corporation was erroneously omitted from the original.

If you have any questions, please feel free to contact me at (406) 444-7724.

Sincerely,

A handwritten signature in cursive script that reads "Tom Martello".

Thomas E. Martello  
Special Assistant Attorney General

Enclosures

TEM/rg

c: Laurie Wallace  
Larry Jones  
Bradley Luck